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Wednesday, October 11, 2006

Prosecute U.S. Justice Department lawyers as war criminals?

In an article most Americans (not including me) will find outrageous, but many international legal scholars and overseas judges will not, Scott Horton argues that U.S. Justice Department lawyers who advised executive officers that acts such as "extraordinary rendition," waterboarding, and so on were legal, when they should have known that they were war crimes, can and should themselves be prosecuted overseas for war crimes, along with the officers who ordered or carried out the alleged war crimes. I have previously discussed how many lawyers in and the bureaucratic culture of the Justice Department, and not just the current President, are morally responsible for the expansions of power, in violation of the U.S. Constitution and international law, that have occurred in the U.S. executive branch in former as well as recent years. Now Horton argues that these lawyers can also be held legally responsible for war crimes under international criminal law when they advised, having actual or constructive knowledge to the contrary, that those criminal acts were legal.

Horton starts with a premise that should be self-evident: "In a proper society, the lawyers are the guardians of law, and in times of war, their role becomes solemn." Horton cites the Nuremburg war crimes case *United States v. Altstoetter.* German Justice Department lawyers had drafted detailed regulations implementing commander-in-chief Adolf Hitler's "Night and Fog" (*Nacht- und Nebelerlass*) decree which authorized secret detentions, i.e. "disappearing" or "extraordinary rendition" in wartime, a violation of the Hague Conventions:

> The [German] Justice Department lawyers were indicted and charged with crimes against humanity and war crimes arising out of the issuance and implementation of the Nacht- und Nebelerlass. The United States charged that as lawyers, "not farmers or factory workers," they must have recognized that their technical justifications for avoiding the application of the Hague and Geneva Conventions were unavailing, because these conventions were "recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war." That is to say, they were customary international law. Further, the United States charged, this decree "would probably cause the death of human beings," grounding a charge of homicidal intent.
>
> After trial, the two principal Justice Department lawyers, one a deputy chief of the criminal division, were convicted and sentenced to ten years' imprisonment, less time served. This judgment clearly established the concept of liability of the authors of bureaucratic policies that breach basic rules of the Hague and Geneva Conventions for the consequences that predictably flow therefrom. Moreover, it establishes a particularly perilous standard of liability for government attorneys who adopt a dismissive attitude towards international humanitarian law.

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Horton also makes the interesting observation that Military Commissions Act, recently passed in the U.S., by so clearly preventing prosecutions within the U.S. for violations of international law, makes the assertion of overseas jurisdiction against U.S. citizens far more clearly legal in "universal jurisdiction" countries. Of course, practical politics will almost surely prevent overseas courts from exerting coercive process over employees of the world' s sole superpower, but it's nevertheless a quite interesting argument:

> Clearly there will be no prosecutions in the US, certainly not under Attorney General Alberto Gonzales, who would figure near the top of anyone's list of criminal conspirators and whose name has already appeared in a criminal indictment relating to Abu Ghraib. But what about universal jurisdiction processes? Spain, France, Belgium, Germany, Switzerland and Italy all have universal jurisdiction statutes. Germany has already entertained a complaint against Rumsfeld, Tenet and others over detainee abuse questions. That complaint was dismissed without prejudice by the German Federal Prosecutor. In his opinion, the Federal Prosecutor stated that the first predicate of the statute had not been met since there was no showing that a prosecution for the crimes shown in the home nation of the defendants would not occur. Considering the political and military position of the United States, the invocation of a universal jurisdiction statute against sitting officers of the government has to be viewed as more than an uphill task. But I think passage of the [U.S. Military Commissions] Act has just made it a whole lot easier.

Reaching U.S. citizens with coercive process could be very difficult. But these universal jurisdiction countries could establish a war criminal suspect watch list for use in their airports, just as we have terrorist watch lists. Many Justice Department lawyers could then find themselves sadly limited in their vacation itineraries.

Posted by Nick Szabo at 1:32 AM

1 comment:

fremont said...

You make a great point. The power grabbing goes far beyond the current president. This gets lost in all the partisan rhetoric.

Bush is a criminal and needs to go, as do many of his Republican henchmen in Congress this fall. But we should not pretend that this by itself will solve the problem. As you show it goes much deeper than that.

1:17 PM

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